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The Hon. Marilyn J. Kelly, Chief Justice  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

Re: ADM File 2009-06

Hon. Justices of the Court:

I fear the proposed amendment to current MRPC Rule 1.5(d) may permit contingent fee agreements for prosecutors in criminal cases. Permitting such fee agreements could damage the public trust in the independence of our state's prosecutors and may lead to ethical conflicts. In my opinion, removing the clause "for representing a defendant" from the proposed amendment would be appropriate.

Rule 1.5(d) currently states:

A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a domestic relations matter or in a criminal matter.

The proposed Alternative A amended rule<sup>1</sup> states:

1.5(d) A lawyer shall not enter into an arrangement for, charge, or collect:

...

(2) a contingent fee **for representing a defendant** in a criminal case. (emphasis added)

Rule 1.5(d) in its current form is clear and straightforward. No lawyer representing any entity in a criminal matter may enter into a contingent fee agreement. The proposed amended language is ambiguous, but would appear to permit contingent fees for prosecutors and all others while excepting only criminal defense attorneys.

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<sup>1</sup> The pertinent section of the proposed Alternative B amendment is substantially identical to Alternative A, but is renumbered as Rule 1.5(e)(3)(B).

Many prosecutors in this state are private practitioners who represent municipal clients on a contractual basis, and therefore may be pressured to accept contingent fee agreements by those municipalities if the current rule is amended. I believe that the practice of accepting contingent fee agreements could result in ethically improper considerations by those prosecutors when trying criminal cases.

The longstanding and revered tradition of fair, independent prosecutors with no personal financial interest in obtaining convictions is central to our criminal trial system. We rely on case review by disinterested prosecutors to determine, among other things; (a) whether specific charges are appropriate given the facts of a case, (b) whether defendants were afforded proper procedure, (c) if witnesses are reliable, and (d) if evidence is sufficient to bring charges for court review. When case review demonstrates that the case is improper or does not have sufficient basis in fact or law to bring a charge, a prosecutor has authority to dismiss the case or change the charge. A prosecutor may even work with law enforcement officials to add additional criminal charges to a case. If the current rule is changed, prosecutors may make their decisions based in part upon a fiscal incentive for obtaining a higher number of convictions. MRCP should not be rewritten so that prosecutors may find themselves considering personal financial enticements during case review.

The proposed amendment could also have the perverse effect of destroying plea negotiations due to the personal financial interest of prosecutors. Consider the case in which a criminal defendant faces multiple criminal charges. During plea negotiations, it is common for prosecutors to negotiate a dismissal of a lesser charge to induce a plea. However, a prosecutor receiving a contingent fee could be fiscally harmed by such dismissals, thus causing him or her to be personally interested in the plea agreement. The problem would be exacerbated if a police officer were to issue both state and municipal citations arising from the same incident, and the defendant were to agree to plea to one charge if the other was dropped. Such an agreement could potentially require dismissal by a contingent-fee prosecutor, who would lose all claims to a fee. This prosecutor may decide not to drop the lesser charge out of his or her personal interest in the case.

Depending upon the structure of contingent fee agreements, prosecutors may also find themselves considering personal pecuniary gain when deciding whether to reduce charges to lesser included offenses in order to induce a plea. Such a prosecutor may be tempted to lessen charges unduly in order to ensure that he or she receive a fee for conviction to the lesser offense rather than face the possibility of losing a case in the uncertainties of trial, and thus receive no compensation at all. A prosecutor should never be put in the position of considering personal pecuniary gain when deciding how to proceed during case review and plea bargaining.

Furthermore, prosecutors are required to divulge exonerating evidence to criminal defendants. Contingent fees would saddle prosecutors with a personal financial interest in hiding that evidence. Whether the proposed amendment would actually result in suppressing evidence is beside the point – the mere appearance of impropriety could in itself be damaging to the public's perception of the fairness and openness of our state's prosecutors when prosecutors respond to discovery.

Contingent fee agreements have also traditionally been deemed impermissible in criminal cases in part because, unlike many civil matters, criminal cases do not produce a settlement or other sum with which to pay the fee. This problem strikes equally against defense attorneys and prosecutors. This is particularly true in the case of an indigent defendant, where there may be no issuance of fines or costs.

Since the current rule and both proposed rules restrict charging contingent fees in criminal cases, it is clear that ethicists find such fees inherently problematic. However, as written, the proposed rules would appear to apply only to defense attorneys and would leave prosecutors or third parties free to charge contingent fees in criminal matters. Therefore, if this Honorable Court accepts the proposed language, it should articulate its reasoning for permitting prosecutors or third parties to charge contingent fees in criminal cases, while disallowing the practice for defense attorneys.

We entrust our public prosecutors with the duty of advocating on behalf of the State or its political subdivisions when people stand accused of breaking the law. Unfortunately, permitting prosecutors to accept contingent fees may undermine the public's faith in the fairness of our criminal justice system. We provide prosecutors with tremendous independence and discretion as they try criminal cases on our behalf. Forces outside of the control of the prosecutor will often determine whether the case will succeed or fail. Our prosecutors should expect reasonable remuneration for their services, and the government should not be able to deny them compensation when a citizen is acquitted or charges are otherwise dropped.

Thank you for affording me the opportunity to provide comment, and thank you for your thoughtful consideration of this matter.

Very Truly Yours,

Thad McCollum